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Chapter 1

Ex Ante Evaluation of Legislation: An Introduction

Jonathan Verschuuren

I. The Rise of Ex Ante Evaluation of Legislation

““Better Regulation” is afoot in Europe.”¹ At the EU level, as well as at the level of many of the Member States, the legislature is seeking to improve the quality of legislation and reduce administrative costs. In this process, much attention is focussed on ‘ex ante’ evaluation or impact assessments. There is a wide variety of such assessments, such as cost-benefit analysis or (Regulatory) Impact Assessment (RIA or IA). Sometimes they simply encompass predictions on the basis of previous (ex post) evaluation research, more often impact assessments are carried out according to a specific methodology. In literature, four reasons for the rise of prior assessments have been distinguished.²

1. The growing complexity of legal systems in Europe where national parliaments and European institutions have become co-actors in a multi-level network of lawmaking feeds the quest for a reduction of uncertainties in the legislative process;
2. The emphasis on output parameters and monitoring of policy results in what is often called “new public management”. If one considers legislation to be an important tool to stimulate economic growth, create jobs and safeguard sustainable development, it is obvious that the public will also confront legislators with an increasing interest in the effectiveness and efficiency of laws. This also explains a growing attention for principles of accountability and good governance;

¹ This is the first sentence of Jonathan B. Wiener’s article ‘Better Regulation in Europe’ (2006) *Current Legal Problems Yearbook* Vol. 59, p. 447.

² R.A.J. van Gestel, ‘Evidence-based Lawmaking and the Quality of Legislation. Regulatory Impact Assessments in the European Union and the Netherlands’ in H. Schäffer & J. Iliopoulos-Strangas (eds.) *State Modernization in Europe* (Ant. N. Sakkoulas-Berliner Wissenschaftsverlag-Bruylant, Berlin, 2007), pp. 139-165. The author refers to various other relevant publications on the topic.

3. The growing fear for regulatory accretion - the danger of rules breeding more rules - that could lead to an increasing evasion of legislation emphasizes the importance of creating thresholds in the law-making process to prevent the promulgation of superfluous laws and regulations;
4. RIA's can provide standards for the process of policy formulation, by showing how consultations, costs and benefits, and trade-offs between policy choices have been taken into account by the legislature. This can make the legislative process more transparent.

Researching the possible or probable effect of a proposed piece of legislation, especially in a situation where uncertainty exists with regard to the problem, as well as the possible solutions, indeed may be more useful than traditional ex post evaluations. Such evaluations have at least three flaws. Firstly, most evaluations of laws in the past have failed to feed the lawmaking process because of bad timing. The policy cycle usually revolves quicker than the research cycle, with the result that 'real time' evaluations often have little influence on law and policymaking. Secondly, ex post evaluation is demand-driven, with few opportunities of cross-fertilization of evaluation results.³ Thirdly, once a piece of legislation has been enacted, it will be difficult to change it substantially, let alone to totally revoke the draft-Bill, even when evaluation shows that the legislation has little or perhaps even an adverse impact.

However, the various kinds of ex ante evaluation methods are sometimes also met with criticism. The instrument appears to be misused by the authorities, for instance by only considering the preferred option,⁴ by not looking into the possible side-effects, and generally by a lack of imagination as it comes to alternative ways of regulation. In addition, the used methodology often is unclear, the instrument often is applied after the basic design of a new policy or new legislation has already been set, and it often primarily focuses on effects that can be easily quantified and monetized. Therefore, Wiener proposes to broaden the instrument to also include

³ Van Gestel, *supra* note 2, p. 139 ff.

⁴ In the UK, the National Audit Office concluded that in 2004, this was the case in 70% of the RIAs (example given by Van Gestel).

“attention to multiple risks, moving beyond a narrow focus on cutting administrative costs or simplification for their own sake, toward criteria that address benefits as well as costs; centralizing expert oversight so that impact assessments actually influence decisions, both to say ‘no’ to bad ideas and ‘yes’ to good ideas; and undertaking ex post evaluation of policies for adaptive policy revision and for improvement of ex ante assessment methods.”⁵

II. Definitions of ‘Ex Ante’ Evaluation of Legislation

In this book, the application of various methods of ‘ex ante’ evaluation of legislation, such as regulatory impact assessments, simulations, experiments, in various fields of law at various levels (i.e., national, EU) are studied. We consider ‘ex ante evaluation’ to be:⁶

Future oriented research into the expected effects and side-effects of potential new legislation following a structured and formalised procedure, leading to a written report. Such research includes a study of the possible effects and side-effects of alternatives, including the alternative of not regulating at all.

This is a rather broad definition that includes various instruments applied at a national level and within international organizations, such as the EU and the OECD, to assess the impact of drafted or yet to be drafted legislation, but excluding informal consultation processes. Both internal and external assessments are included in our definition. Sometimes the assessment is made within the competent authority, in other examples there is a more independent body that either carries out the assessment or controls the quality or validity of the assessment. Another difference between various forms of ex ante evaluation is that some of these instruments assess the impact on a whole range of interests, while others only assess the impact on a specific interest, such as gender, the environment, low income groups, small and medium sized enterprises, or the economy. The instruments that cover a wide variety of aspects usually are called Regulatory Impact

⁵ Wiener, *supra* note 1, p. 508.

⁶ This definition is based on the definition that was used by the Netherlands Court of Audit in a 2000 report on the organization of policy assessments: Parliamentary Docs. II, 1999-2000, 27 065, Nos. 1-2, p. 18 (available at its website http://www.rekenkamer.nl/9282000/d/p115tk27065_2.pdf). I added the criteria of the formalized procedure and the written output.

Assessment (RIA) or simply Impact Assessment (IA). The DIADEM database on the practice of IA in the EU Member States defines IA as follows:⁷

“A systematic, mandatory, and consistent assessment of aspects of social, economic, or environmental impacts such as benefits and/or costs, affecting interests external to the government, of proposed regulations and other kinds of legal and policy instruments, to i) inform policy decisions before regulation, legal instrument, or policy is adopted, or ii) assess external impacts of regulatory and administrative practices, or iii) assess the accuracy of an earlier assessment.”

This definition shows that ex ante evaluation as defined in our book is a broader concept than RIA or IA. Since 2003, the European Commission applies an IA to all legislative proposals with the following key objectives:⁸

1. “Improve the quality of Commissions proposals, in particular by facilitating a more systematic, coherent, analytical, open, and evidence-based approach to policy design, and by providing a thorough, balanced and comprehensive analysis of likely social, economic and environmental impacts.
2. Provide an effective aid to decision-making, in particular by providing policy makers with relevant and comprehensive information on the rationale behind proposed interventions, and their likely impacts, and by enabling policy makers to assess trade-offs and compare different scenarios when deciding on a specific course of action.
3. Serve as a valuable communication tool, in particular by fostering internal communication and ensuring early and effective co-ordination within the Commissions, and by enhancing external communication by making the policy development process more open and transparent to external stakeholders.”

III. Goal and Methodology

Literature on such topics as ‘better regulation’ or on ‘(regulatory) impact assessments’ is quite abundant. Most of these publications, however, are journal articles focussing only

⁷ Taken from the European Network for Better Regulation (ENBR) Handbook ‘How to perform the DIADEM data collection’, by Claudio Radelli, Bruno Dente, Scott Jacobs, Colin Kirkpatrick, Anne Meuwese, Andrea Renda, 31 July 2006, p. 5.

⁸ Taken from the 2007 Evaluation of the Commission’s Impact Assessment System by John P. Watson and others, Richmond, April 2007, p. 3.

on a specific element of regulatory assessments. More comprehensive books on the topic are scarce. They either only consist of practical guidelines to conduct assessments,⁹ do not go beyond sketching the politics and philosophy behind the various ‘better regulation’ schemes,¹⁰ or only focus on the EU IA system.¹¹ A comprehensive critical legal analysis of the various forms of ‘ex ante evaluation’, focussing on legislation, rather than on policies, is still lacking. The aim of the book is to develop such a critical analysis, and, ultimately, to thus assess the prospects of ex ante evaluation of legislation. What are the benefits of ex ante evaluation and what not? Under which conditions should which form of ex ante evaluation be applied? What should be their role in the legislative process?

Under auspices of the Tilburg University Research Group on Methodology of Law and Legal Research, we have brought together specialists from the field of legislative studies within Europe to provide such a state of the art analysis through studying various forms of ‘ex ante evaluation’ in various countries and on the EU level. The book has been written by an interdisciplinary group of academics. The authors mainly stem from various fields of law, but also from the fields of political and social sciences. All have a special expertise on legislation. To achieve the comprehensive result that lies in front of you, draft contributions were discussed within the group of authors on two occasions in Tilburg (August 2007 and February 2008). During intensive workshops abstracts and draft chapters were discussed. Subsequent discussions took place through email.

IV. Research Questions and Approach

In order to answer the question what the prospects of ex ante evaluation of legislation are, two paths are followed. First, we focus on the context of ex ante evaluation, then we will focus on some specific forms of ex ante evaluation: what do they encompass and what are the experiences with these instruments?

⁹ Andrea Renda, *Impact Assessment in the EU. The State of the Art and the Art of the State* (CEPS, Brussels, 2006).

¹⁰ Neil Gunningham, P. Gabrosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press 1998). Exceptions can be found in smaller articles, such as the critical article by Robert Baldwin, ‘Is Better regulation Smarter Regulation?’ (2005) *Public Law*, pp. 485-511.

¹¹ Giandomenico Majone, *Regulating Europe* (Routledge, London, 1996).

The first part of the book (chapters 2-6) deals with the background of ex ante evaluation of legislation. What is the political, economic, or public policy background against which the instrument of ex ante evaluation has emerged? Why have they emerged, and what are the (common or different) goals of the various forms of ex ante evaluation? Also the political and methodological constraints of ex ante evaluation of legislation are researched.

In chapter 2, Popelier and Verlinden show how ex ante evaluation has developed from various perspectives, i.e., the perspective of legislative theory (the rational lawmaker, the governance approach), and economic theory (administrative simplification, deregulation, economic advantages of 'good regulation', regulatory impact assessment). The authors also show that ex ante evaluation can be relevant in legal practice, for instance in case decisions by courts.

As this chapter shows that economic arguments have been the main reason for the rise of various forms of ex ante assessment of the effect of proposed legislation, the entire next chapter is devoted to the economic approach. Larouche critically analyses the various economic rationales behind ex ante evaluation in order to be able to assess the quality of the assessments.

Chapters 4 and 5 focus on the political and institutional context of ex ante evaluation. In chapter 4, Bohne shows that there are political and institutional constraints that make an objective, true scientific, assessment difficult if not impossible. Instead, ex ante assessments are part of the political process. The author looks into such political and institutional constraints to research the productivity of ex ante assessments.

In chapter 5, Hoppe takes the policy process in which decision-making on new legislation takes place as a starting point, to assess the benefits and limitations of the various forms of ex ante evaluation of legislation. What is the instrument's current and potential role given the specific character of the politically oriented policy processes? The author thus sets the boundaries within which the instrument has to be used.

In the final chapter of part I, chapter 6, the methodological aspects of ex ante evaluation are reviewed. Van Aeken, a social scientist, critically reviews the methodology that is used in various forms of ex ante evaluation and assesses the scientific quality of the assessments. He sets out to answer the question whether a

prospective evaluation is more than ‘guesstimating’ the impact of certain legal interventions.

The second part of the book discusses past and current experiences with various forms of ex ante evaluation in different countries and at the EU level. What are the experiences with ex ante evaluation? What subjects have been dealt with? What methodology has been used? What was the outcome of the evaluation? Where in the legislative process, and by whom, has the evaluation been carried out, and how (if at all) have the results been used by the legislature? The chapters in part II (chapters 7-11) of the book thus not only describe current practice, but also critically analyse the practical effect of ex ante evaluations on the quality of legislation.

In chapter 7, Senden en Meuwese focus on the development of the European Commission’s Impact Assessment system at the EU level and the various goals that such assessments have. One of these goals is deregulation and the promotion of alternative modes of regulation, such as the use of self-regulation, co-regulation, and soft law. Authors also evaluate whether these alternatives have actually been used more often since the introduction of Impact Assessments.

The following chapters all focus on national forms of ex ante evaluation of legislation. In chapter 8, Sylvia Veit looks into the experiences with the implementation of ex ante evaluation in Sweden and Germany. Ex ante evaluation sometimes already dates back to the 1970s and 1980s. The author has made a detailed study of all legal proposals that were submitted in both countries in 2006, as well as of all German draft bills from 1999 and 2003 to show how assessments look like and to find an answer to the question why national assessment requirements are not always met.

Chapter 9 assesses the accuracy of ex ante evaluations through studying later ex post evaluations (‘feedback research’). Van Gestel and Vranken do so by looking into advisory documents of the Netherlands Council of State. In the Netherlands, like in France, the Council of State advises the government and parliament on legislation. As this institution already exists for quite some time, it is interesting to see how they assess the expected effect of proposed legislation and whether their assessment in the end proved to be correct or not. Authors do so by selecting a number of bills and compare the

ex ante evaluation by the Council of State to ex post evaluations of the legislation that have been carried out later.

The empirical part of the book ends with a chapter on an issue where legislation was introduced without any form of ex ante assessment, i.e., in the field of corporate tax law in the Netherlands. In chapter 10, Vording and Gribnau review the legislative process of the 2007 corporate income tax reform in the Netherlands by focusing on the various stakeholders involved. How have the interests of these stakeholders been used by the legislature, and would this have been different when some form of ex ante evaluation would have been applied? Would a full ex ante evaluation of aims, options, and effects of corporate income tax reform –in retrospect– have been a useful tool in the legislative process?

Chapter 11 is the concluding chapter of the book. This chapter focuses on the future. What are the prospects of ex ante evaluation of legislation? What are the benefits and what is the downside of ex ante evaluation? Under which circumstances should it be applied and when should it not be applied, given the instrument's limitations? These questions will be answered using the data offered by the nine preceding chapters of the book.